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No. 93-373

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In The

Supreme Court of the United States

October Term, 1993

BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS,

Petitioner,

vs.

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD AND THE STATE BOARD OF EDUCATION OF THE STATE OF NEW JERSEY,

Respondents,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New Jersey

BRIEF IN OPPOSITION FOR RESPONDENT BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD

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QUESTIONS PRESENTED

1. Should the Court deny certiorari where the decision below is not a final decision?

2. Should the Court deny certiorari where state education officials are studying whether to regionalize the school districts involved in this case, and where new remedies that could be ordered after completion of that study may fundamentally alter the relationship among these districts and render petitioner's issues moot?

3. Should the Court deny certiorari where the Court's own precedents are inconsistent with petitioner's standing?

4. Should the Court deny certiorari where the petition substantially distorts the case?

5. Should the Court deny certiorari because the federal question presented is insubstantial, lacks merit, and was correctly determined below?

6. Should the Court deny certiorari where the petitioning board of education has contributed to *de jure* school segregation and is seeking the Court's discretionary assistance to advance petitioner's segregationist goals?

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STATEMENT OF LACK OF JURISDICTION

This Court lacks jurisdiction because the decision sought to be reviewed is not final. In addition, petitioner lacks standing. *See* Point I.

ADDITIONAL CONSTITUTIONAL PROVISIONS INVOLVED

New Jersey Constitution, Article I, paragraph 5:

> No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin.

New Jersey Constitution, Article VIII, Section IV, paragraph 1:

> The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.

STATEMENT OF THE CASE

A. Additional Procedural History Demonstrates That There Is No Final Decision.

Petitioner's statement of procedural history is incomplete in

crucial respects. The case came before the New Jersey Supreme Court on leave to appeal, granted to review an interlocutory order requiring a regionalization study, as well as on certification; the appeals were related and consolidated. Ra 1-8; *see* Pa 10.[1] The New Jersey Supreme Court decision sought to be reviewed by this Court affirmed, among other things, the interlocutory "order requiring a regionalization study. . . ." Pa 3.[2]

The study was originally ordered by the New Jersey State Board of Education ("State Board") on July 3, 1991, while appeals of its April 4, 1990 decision were pending in the Appellate Division of the New Jersey Superior Court ("Appellate Division"). Pa 10. Recognizing that the study order was not a final order, petitioner sought and obtained that court's leave to appeal an interlocutory order. *Id.*

The interlocutory study order provides that "a regionalization study now be conducted to explore the potential for establishing a regional school district. . . ." Ra 11. The study is ongoing. Petitioner is participating and raising some of the same points it urges here; *e.g.*, a magnet school remedy. *Compare* Ra 12-13, with Petition ("Pet.") at 24. To date, there has been no study result and no final decision by the State Board or the New Jersey courts as to whether the three districts should be regionalized.

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1. "Ra" refers to Respondent's Appendix, annexed hereto. "Pa" refers to the Appendix to the Petition.

2. The last two opinions below have been published. *Board of Educ. of Englewood Cliffs v. Board of Educ. of Englewood*, 257 N.J. Super. 413, 608 A.2d 914 (App. Div. 1992), *aff'd per curiam*, 132 N.J. 327, 625 A.2d 483 (1993). They are also contained in the Appendix to the Petition ("Pa"). Citations to the opinions below herein are to that Appendix ("Pa").

B. The Communities And The Schools.

Englewood is a heterogeneous and relatively affluent urban community. Pa 11. Its neighbors, suburban Englewood Cliffs and Tenafly, are more affluent, but much less diverse; they are "primarily white with growing Asian populations." *Id.*

Dwight Morrow High School ("DMHS") is Englewood's public high school. It is a "*very* good school," Pa 64 (emphasis in original), which "more than adequately prepares its students for college and later life." Pa 124. However, due to the actions of petitioner Board of Education of the Borough of Englewood Cliffs, in conjunction with respondent Board of Education of the Borough of Tenafly ("Tenafly Board"), as well as to demographic changes, Pa 205, n.4, DMHS is racially imbalanced. In 1987-88, the last year of record evidence, its student population was 11.8% white, 66.2% black, 17.8% Hispanic, and 3.9% Asian. Pa 19. DMHS has a racially balanced faculty. Pa 13 (61% white, 32% black and 6% Hispanic or Asian).

Tenafly High School ("THS") is only 2.4 miles away from DMHS, Pa 260, but the two schools are worlds apart in terms of diversity. The THS faculty of 87 is "characterized by a lack of ethnic diversity . . . ," Pa 15, with no black teachers and only one Hispanic and one Asian teacher. Pa 216. In 1987-1988, the THS student body was 80.7% white, 17.8% Asian, 0.9% Hispanic and 0.6% black. Pa 21. Although petitioner claims that THS is a superior school, that claim has been soundly rejected by New Jersey education officials and the courts below. *See, e.g.*, Pa 64 (criticizing the THS "formula for educational success," and finding that THS "is not a realistic forum for interaction among the children of different races.")

C. The Sending/Receiving Relationship.

A sending/receiving relationship is a creature of state statutory law. *N.J. Stat. Ann.* §18A:38-11; Pa 59. By way of example, a community that is too small to have its own public high school (the "sender"), enters into a relationship with a district that operates a high school (the "receiver"), and the receiver's high school becomes the public school for the sender's students. *Id.* Due in part to the need for stability, Pa 59-60, a sending/receiving relationship cannot be terminated without the approval of New Jersey's Commissioner of Education ("Commissioner"). *N.J. Stat. Ann.* §18A:38-13.

When sending districts apply for termination, the Commissioner must make "equitable determinations based upon consideration of all the circumstances, including . . . the impact on the quality of education received by pupils, and the effect on the racial composition of the pupil population of the districts." *Id.; see also* Pa 61. A "long-standing" and "vigorous" state constitutional policy "against racial discrimination and segregation in the public schools . . . ," *Booker v. Board of Educ.*, 45 N.J. 161, 173-174, 212 A.2d 1, 8 (1965); *see* N.J. Const., Art. I, para. 5, also limits termination of sending/receiving relationships. *Jenkins v. Township of Morris Sch. Dist.*, 58 N.J. 483, 279 A.2d 619 (1971).

DMHS became the public high school for Englewood Cliffs when petitioner entered into its sending/receiving relationship with the Englewood district almost thirty years ago. Pa 16. This case began when petitioner applied to the Commissioner to terminate that relationship and to create a new one with the Tenafly district, so that THS would become Englewood Cliffs' public high school. Pa 7.

D. Petitioner Has Facilitated White Flight With The Assistance Of The Tenafly Board's Pernicious Private Tuition Policy. Segregation Here Is *De Jure* As Well As *De Facto*.

Despite the hypocritical posturing that runs throughout the petition, petitioner is not an "innocent." *See, e.g.*, Pet. at 10. It has encouraged and facilitated white flight from DMHS. It has caused and exacerbated racial imbalance. Petitioner's assertion that its community is motivated by legitimate educational concerns, Pet. at 5, 8, is cynically false. As the Commissioner flatly put it: "no one could seriously believe that racial prejudice and circumvention of integration is not at play in this case." Pa 42.

The evidence of prejudice in Englewood Cliffs includes "compelling" testimony that Englewood Cliffs students regularly refer to Dwight Morrow High School as "Black Morrow" and "Dwight Nigger." Pa 22, 209. Pursuant to its sending/receiving relationship, petitioner had an "obligation to . . . encourage its students to attend their designated receiving school . . . ," DMHS, but it instead facilitated and exacerbated their white flight. Pa 134; *see also* Pa 66 (referring to "Cliffs' failure since 1982 to encourage its students to attend DMHS"). Petitioner and its employees encouraged Englewood Cliffs students to cross district lines to attend THS, a private school to them, by, among other things, taking "a favorable view towards" Tenafly's private tuition program. Pa 115. They also provided written instructions detailing how to apply to THS, although they provided no such instructions for any other "private" school. Pa 18, 115. Petitioner also has encouraged white flight by its wholly unfounded attack on the quality of DMHS, which continues to this day in the petition before the Court, despite strong and unanimous rejection by the five decisionmakers below. *See, e.g.*, Pa 64, 39-40.

Respondent Tenafly Board abetted Englewood Cliffs' white flight and caused racial imbalance at DMHS by its highly selective

and "novel" private tuition policy. Pa 32. The Tenafly tuition policy "lured" and "enticed" primarily affluent white and Asian students from DMHS, thereby "subverting that school's efforts to promote racial balance . . . ," and seriously undermining "the continuing ability of the Englewood district to provide equal educational opportunity to all its students." Pa 78, 32-33, 20; *see also* Pa 48, 66, and 78 (there is a "direct relationship" of "cause and effect" between the tuition policy and racial imbalance at DMHS).

With the tuition policy, petitioner and the Tenafly Board created, and encouraged the use of, their own interdistrict "remedy" in order to circumvent the sending/receiving relationship. Seeking a racially segregated education for Englewood Cliffs children, petitioner urged the Commissioner to sanction a prejudiced purpose, but the Commissioner, the State Board, and New Jersey's courts refused.

This Court should not act otherwise. It should not be misled by petitioner's misrepresentations. For example, at page 17, petitioner falsely alleges: "Neither the State Board nor the New Jersey courts found active or passive racial discrimination by any unit of government, and certainly not by Cliffs." To the contrary, New Jersey's appellate courts found that *de jure* segregation is "the leitmotif which runs throughout the decisions here." Pa 75-76.[3]

E. The Decisions Below.[4]

All five decisionmakers below applied state statutory and

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3. There are other blatant mischaracterizations in the petition. Pursuant to respondent's obligation to bring them to the Court's attention, Sup. Ct. R. 15.1, they are detailed in Point III, *infra*. The pervasiveness of petitioner's inaccuracy is reason enough, of itself, to deny the petition. Sup. Ct. R. 14.5.

4. Because petitioner heavily relies upon findings by an administrative (Cont'd)

constitutional law to reject petitioner's plea to terminate the sending/receiving relationship because of substantial negative impacts on educational quality and racial balance. *See, e.g.*, Pa 59-68; 3 (affirming "substantially for the reasons set forth in" the Appellate Division's opinion). Similarly, all decisionmakers concluded that an injunction was warranted and necessary. *See, e.g.*, Pa 77-79.

In addition, the Commissioner and the State Board, New Jersey's highest education authority, ultimately concluded that those minimally intrusive remedies would not likely eliminate segregation. The Commissioner recommended, and the State Board ordered, the regionalization study that is now in process. Pa 86. Within the context of this litigation, Pa 84-89, the State Board is now considering whether to regionalize — whether to merge — the three litigating districts to achieve racial balance, pursuant to state constitutional policy and precedent. *Jenkins*, 58 N.J. 483, 279 A.2d 619 (regionalization is a state constitutional remedy for segregation.)

REASONS FOR DENYING THE WRIT

In this school segregation case, petitioner turns the Fourteenth Amendment "on its head," Pa 77, seeking federal constitutional sanction for removal of its resident children from a predominantly black public school in order to send them to a predominantly white

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(Cont'd)

law judge ("ALJ"), it is appropriate to note the significant limitations on a New Jersey ALJ's authority. Pursuant to New Jersey law, ALJs make only recommendations to state agencies; they have no independent decisional authority. *In re Kallen*, 92 N.J. 14, 20-23, 455 A.2d 460, 462-464 (1983); *N.J. Stat. Ann.* § 52:14F-7. In considering an ALJ's recommendation, both the Commissioner and the State Board (the agency head) have authority to find facts *de novo*, unfettered by the usual appellate standard of review. *Dore v. Bedminster Tp. Bd. of Educ.*, 185 N.J. Super. 447, 452, 449 A.2d 547, 550 (App. Div. 1982).

public school. This cynical proposition is presented by a petitioner that lacks standing in a proceeding that lacks finality.

The petition for certiorari is burdened with factual error, and is wrong as a matter of procedure, law, and public policy. It is a classic example of a petition that deserves denial.

I.

CERTIORARI SHOULD BE DENIED BECAUSE THE COURT LACKS JURISDICTION AND BECAUSE OF JURISPRUDENTIAL CONSIDERATIONS.

A. The Court Lacks Jurisdiction Because The Decision Sought To Be Reviewed Is Not Final.

The threshold question presented by this petition for certiorari is whether there is sufficient finality to warrant review. 28 *U.S.C.A.* §1257(a). It is necessary to address this question in its factual context because, as to finality, there is no bright line. Stern, Gressman, Shapiro, *Supreme Court Practice* § 3.8, p. 124 (6th ed. 1986). As Justice Frankfurter put it: "No self-enforcing formula defining when a judgment is 'final' can be devised." *Republic Natural Gas Co. v. Oklahoma,* 334 U.S. 62, 67 (1948). "The considerations that determine finality are not abstractions but have reference to very real interests — not merely those of the immediate parties but, more particularly, those that pertain to the smooth functioning of our judicial system." *Id.* at 69.

In this case, a state administrative agency and state courts adjudicated state constitutional and statutory issues. The decisions below dealt with three remedial requests, but disposed of only two. The decisions denied petitioner's request for severance of an existing sending/receiving relationship between Englewood Cliffs and Englewood, and for establishment of a new sending/receiving

relationship between Englewood Cliffs and Tenafly. The petition seeks review of this denial. Secondly, the decisions granted Englewood's request for ancillary injunctive relief, precluding Tenafly (and other districts) from undermining the existing sending/receiving relationship by accepting private tuition students from Englewood and Englewood Cliffs. The petition also seeks review of this ancillary remedy.

But the decisions below did not dispose of the third remedial request — Englewood's application for compulsory establishment of a high school regional district to include Englewood, Englewood Cliffs, and Tenafly. Rather, the administrative agency declined to order regionalization "at this juncture," Pa 137, and subsequently ordered "that a regionalization study now be conducted to explore the potential for establishing a regional school district. . . ." Ra 11. The Appellate Division considered the resulting regionalization arguments, Pa 79-89, and sustained the administrative agency: "We affirm the order denying regionalization at the present time, and we affirm the order for a regionalization study." Pa 89. The Appellate Division declined "to place specific time limits on the completion of this difficult task [the regionalization study]," but ruled: "If it appears that a further unreasonable delay is occurring during the study, any party may return to us to apply for a more definitive time table." Pa 88. The New Jersey Supreme Court affirmed "the authority of the State Board of Education to undertake such a regionalization study," but emphasized that it was expressing no view "on the administrative or judicial power to require inter-district regionalization." Pa 3.

The regionalization study is now proceeding with input from all three districts. *See, e.g.*, Ra 12-13. If it results in regionalization, the sending/receiving relationship would be superseded and the ancillary injunction may not be necessary. There would be a brand new configuration, as explained by the Appellate Division: "The effect of such a regional district here

would be to transfer control over DMHS and THS to a regional school board." Pa 79.

Thus, if the administrative agency orders regionalization and the state courts affirm, petitioner's equal protection challenge may well be raised again, albeit in a new factual and relational context. If, on the other hand, the administrative agency or the state courts deny regionalization, the remedial phase of this case will be complete, and review of the severance and injunction issues could be considered in the light of whatever new facts are adduced during the regionalization study process. Even if there were no finality rule, common sense would dictate postponement of consideration of certiorari until the remedial phase has been completed. But there is a finality rule to which we now turn.

Subject to limited exceptions, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-487 (1975), none of which apply here (*e.g.*, *Cox* itself involved a potential chilling effect on freedom of the press), "the final-judgment rule has been interpreted 'to preclude reviewability . . . where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State.' " *Flynt v. Ohio*, 451 U.S. 619, 620 (1981), quoting from *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). Three important reasons for the finality rule particularly apply to the facts of this case:

1. *Piecemeal review:* The final judgment rule is "[d]esigned to avoid the evils of piecemeal review. . . ." *Republic Natural Gas Co.*, 334 U.S. at 67; *see Flynt*, 451 U.S. at 621 (one finality issue was the "probability of piecemeal review with respect to federal issues"). The piecemeal review purpose is served by insuring that the remaining litigation does not "raise other federal questions that may later come here." *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 633 (1981), quoting from *Radio Station WOW, Inc.*,

326 U.S. at 127; *see Flynt*, 451 U.S. at 621 ("no other federal issues to be resolved"). Here, there is a significant likelihood that petitioner's equal protection claim will be recycled, in different factual and probably different relational circumstances, once New Jersey's administrative and judicial authorities have resolved the regionalization question and completed the remedial phase of this litigation. The "probability of piecemeal review with respect to federal issues," *Flynt*, 451 U.S. at 621, suggests denial of certiorari on finality grounds here.

2. *Judicial restraint:* "The policy against premature constitutional adjudications demands that any doubts . . . be resolved against jurisdiction." *Republic Natural Gas Co.*, 334 U.S. at 71. "[F]or the soundest of reasons we ought not to pass on constitutional issues before they have reached a definitive stop." *Id.* Here, there is not only the abstract caveat against precipitous constitutional adjudication, but the case-specific caution that judicial restraint will permit the Court to see this matter fully developed and in its final permutation.

3. *State-federal comity:* The final judgment rule "is especially pertinent when a constitutional barrier is asserted against a State court's decision on matters peculiarly of local concern." *Republic Natural Gas Co.*, 334 U.S. at 67. Public education, at issue here, is surely one of those matters of local concern. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973).

The final judgment rule precludes jurisdiction here because something "further remains to be determined by a State court" and it is not even "dissociated from" the federal issues already decided. *Flynt*, 451 U.S. at 620. The rule precludes jurisdiction also because its three purposes would be disserved by granting certiorari here. And the rule precludes jurisdiction because the only close precedent — *Republic Natural Gas Co.*, 334 U.S. 62 — suggests a lack of finality on the facts of the case at bar.

In *Republic Natural Gas Co.*, an Oklahoma administrative agency ruled, and the Oklahoma Supreme Court affirmed, that, under Oklahoma law, one company had to ratably take natural gas from another company's wells. Although this substantive point of law had thus been finally determined, the remedial phase of the case was not complete: "Republic is required to take ratably from Peerless, but it may do so in any one of three ways." 334 U.S. at 69. This remedial incompleteness prompted the Court to decline jurisdiction on the ground that there was no final judgment.

Citing *Republic Natural Gas Co.*, Stern, Gressman, Shapiro, *Supreme Court Practice* § 3.11, p. 135, pertinently states: "To be reviewable, an administrative order which has been reviewed by the highest state court must be the final adjudication *in a completed administrative process. . . .*" (Emphasis added). The administrative process in this case is not "completed." A regionalization study is ongoing. It may result in a regionalization order. The study will produce new facts that bear on the issues raised in the petition, and a regionalization order would reconfigure the relational pattern of the parties before the Court.

The judgment of which petitioner seeks review lacks finality. For this reason alone, certiorari should be denied.[5]

B. Petitioner Lacks Standing.

Petitioner is a school board, the governing body of a school district. Unlike school desegregation cases that typically come before this Court, *see, e.g., Swann v. Charlotte-Mecklenburg Bd. of*

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5. The Court need not be concerned about hardship to petitioner should review be denied for lack of finality. With regard to the two issues addressed in the petition, neither a stay, nor expedited review, was sought from the state courts. Petitioner should not be heard to complain now.

Educ., 402 U.S. 1 (1971), no parents or students are parties.[6]

In New Jersey, school districts are subdivisions of the state. *See, e.g., Jenkins*, 58 N.J. at 500, 279 A.2d at 629. Pursuant to this Court's precedents, state subdivisions may not challenge actions of their state creators on Fourteenth Amendment equal protection grounds. *City of Newark v. New Jersey*, 262 U.S. 192 (1923) (holding that a municipality may not challenge its state's action on Fourteenth Amendment equal protection grounds); *see also Williams v. Mayor of Baltimore*, 289 U.S. 36 (1933) (same result regarding Fourteenth Amendment privileges and immunities); *City of Trenton v. New Jersey*, 262 U.S. 182 (1923) (same result regarding Fourteenth Amendment due process clause). The rationale for the rule is:

> A municipality is merely a department of the state, and the state may withhold, grant, or withdraw powers and privileges, as it sees fit. However great or small its sphere of action, it remains the creature of the state, exercising and holding powers and privileges subject to the sovereign will.

Id. at 187. As Justice Cardozo succinctly stated: "A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." *Williams*, 289 U.S. at 40. This rationale applies equally to school boards, as to other governmental subdivisions. *See, e.g., Gwinn Area Community Schools v. Michigan*, 574 F. Supp. 736, 742-743 (W.D. Mich. 1983), *modified on other grounds*, 741 F.2d 840, 844 (6th Cir. 1984).

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6. Years ago, one parent, (R.S.), intervened on behalf of one student, (A.S.), to raise a narrow issue that has now become moot. Those parties are no longer in the case. Pa 9, n.1.

Some lower courts have attempted to distinguish this Court's precedents. *Rogers v. Brockette*, 588 F.2d 1057, 1067-1071 (5th Cir.), *cert. denied*, 444 U.S. 827 (1979); *Akron Bd. of Educ. v. State Bd. of Educ.*, 490 F.2d 1285, 1289-1292 (6th Cir.), *cert. denied*, 417 U.S. 932 (1974). But this Court has never recognized the asserted distinctions, which, in any event, are inapposite here.[7] Thus, pursuant to this Court's precedents, petitioner lacks standing to raise the issues it seeks to present. At the very least, there is substantial doubt and that doubt militates against the exercise of discretionary review.

C. The Court's Traditional Reluctance To Interfere With Local Education Matters Counsels Against The Grant Of Certiorari.

Because of a lack of "specialized knowledge" in, and "experience" with, local problems, this Court has historically been reluctant to prematurely interfere "with the informed judgments made at the state and local levels" about public education. *See, e.g., San Antonio Indep. Sch. Dist.*, 411 U.S. at 42. That reluctance should lead to a denial of certiorari here, where the challenged decision implicates educational policy judgments by state education officials, and particularly where interference would be premature given the State Board's ongoing remedial study of these very districts.

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7. Respondent knows of no case where the limits of standing were stretched so far as to permit a *public* board of education to champion the rights of students to attend *private* schools. Yet this is what petitioner seeks to do with its challenge to the injunction because any "public" high school other than DMHS is a "private" school to Englewood Cliffs residents (*e.g.*, parents pay private tuition; public monies cannot be used). *Cf.* Pa 19 (referring to Tenafly's tuition students as "private students").

II.

CERTIORARI SHOULD BE DENIED BECAUSE THERE ARE NO "SPECIAL AND IMPORTANT REASONS" TO GRANT IT.[8]

A. This Case Does Not Present The Question Posed By The Petition.

The Petition poses essentially one question: may state courts order race-conscious interdistrict remedies for school segregation without findings or proof of *de jure* segregation? *See, e.g.*, Pet. at 10. In fact, that question is not presented by this case.

First, there are no interdistrict remedies. Maintaining the sending/receiving relationship merely keeps in place the district line of what is, under New Jersey law, a single school district for high school purposes. Pursuant to the statutory sending/receiving relationship, the attendance district for DMHS encompasses Englewood Cliffs as well as Englewood. In seeking to change that relationship, *petitioner* is attempting to redraw district lines. The injunction is a necessary ancillary remedy to maintenance of the existing sending/receiving relationship. It preserves current district lines. It prevents the Tenafly district and others from creating interdistrict arrangements that can be used to foster racial segregation. Although state education officials are now studying an interdistrict remedy (regionalization), to date they have not ordered one.

Second, as detailed in respondent's Statement of the Case, there are both evidence and findings of *de jure* segregation here. Although the New Jersey Constitution prohibits *de facto* as well as

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8. "A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Sup. Ct. R. 10.1.

de jure segregation, *see Jenkins*, 58 N.J. at 506, 279 A.2d at 631-632; *Booker*, 45 N.J. at 170-171, 212 A.2d at 6, and the decision below would be justified by *de facto* segregation alone, there is far more to this case. There is acquiescence in, and active facilitation of, discrimination by two governmental entities — petitioner and the Tenafly Board. There is *de jure* segregation. *See City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 492 (1989) (the state can take "affirmative steps" to avoid becoming a "passive participant" in discrimination); *Norwood v. Harrison*, 413 U.S. 455, 466 (1973) (state education aid is unconstitutional "if that aid has a significant tendency to facilitate, reinforce, and support private discrimination.") Indeed, as found below, *de jure* segregation is "the leitmotif which runs throughout the decisions here." Pa 75-76.

B. There Is No Substantial Federal Question And No Conflict With Decisions Of This Court.

This is a state law case that petitioner attempts to puff up into a federal constitutional controversy. The courts below applied only state law to find a state constitutional violation and fashion state constitutional remedies. The purported federal question was asserted by petitioner belatedly,[9] and only defensively. The mere assertion of a non-meritorious federal defense does not magically transform a state law case into a federal matter important enough to warrant certiorari.

In any event, the insubstantial federal defense has no merit. As found below: "No amount of ingenuity can bring this case within the interdiction of *Bakke*, *Wygant* and *Croson* which involved absolute racial preferences in a zero-sum context." Pa 72.

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9. Petitioner did not even raise the defense at the trial or before the Commissioner, although the Tenafly Board unsuccessfully raised a similar defense. Pet. at 4, 5.

The Appellate Division comprehensively dissected petitioner's argument in a concise analysis that has been affirmed by New Jersey's highest court. That analysis appears in petitioner's Appendix at pages 68-77, and for convenience is repeated in the Appendix to this brief at pages 14a-22a. By way of summary:

1. There is no racial classification here. At most, there may be a geographic classification that applies equally to all races (typical of public school attendance zones generally); *see* Pa 73, reproduced at Ra 18;

2. Thus, strict scrutiny is not warranted; *see* Pa 69-73, reproduced at Ra 15-18; and

3. In any event, the remedies would survive strict scrutiny because they are narrowly tailored, and there are compelling interests in diversity and in assuring that public monies do not finance private prejudice; *see* Pa 73-76, reproduced at Ra 19-21.

Respondent Englewood Board respectfully incorporates the Appellate Division's comprehensive analysis by reference, and defers to it for a full explanation of these points.[10]

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10. This Court's later decision in *Shaw v. Reno*, 509 U.S. ___, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993), does not assist petitioner. That case involved a bizarre apportionment that was an obvious "effort to segregate voters into separate voting districts because of their race. . . ." *Id.*, 509 U.S. at ___, 113 S. Ct. at 2832, 125 L. Ed. 2d at 536. There is nothing even close to that here — except for the petition itself, which does constitute an "effort to segregate."

III.

CERTIORARI SHOULD BE DENIED BECAUSE THE PETITION IS SUBSTANTIALLY INACCURATE.

This point is included pursuant to respondent's "obligation to the Court" to point out "any perceived misstatements of fact or law set forth in the petition which have a bearing on the question of what issues would properly be before the Court if certiorari were granted." Sup. Ct. R. 15.1. Petitioner's misstatements are pervasive, and the result is substantial distortion of the case. This is an additional and independent reason for denying certiorari. Sup. Ct. R. 14.5. The primary[11] distortions are:

1. As delineated above, petitioner's statements proclaiming its innocence, *e.g.*, Pet. at 10 and 12, the absence of findings of "active or passive racial discrimination . . . ," *e.g.*, Pet. at 17, and the absence of "proof of discrimination . . . ," *e.g.*, Pet. at i, Question 2, and Pet. at 11, are false. Petitioner is not "innocent;" there are such findings; and there is ample proof. *See* Statement of the Case at D and Point IIA, herein.

2. Similarly, petitioner's statements that its actions and Tenafly's private tuition policy did not cause racial imbalance at DMHS are wrong. *See, e.g.*, Pet. at i, Questions 1 and 2; 8 ("The THS tuition plan had no demonstrable effect upon enrollment at DMHS); 17-18 (petitioner's action had no "substantial *inter*district effect;" emphasis in original). As noted in the Statement of the Case at D, there are findings of cause and effect. *See, e.g.*, Pa 48 ("The State Board concluded that there was a cause

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11. It would not be helpful to respond to every false statement and mischaracterization of evidence in the petition. Respondent does not waive its objection to the false statements in the petition that have little or no bearing on whether the Court should grant certiorari.

and effect . . ."); Pa 66 (referencing a "direct relationship of that policy to the accelerated decline in white enrollment at DMHS"); Pa 134 (petitioner facilitated white flight). The ALJ, whom petitioner cites again and again, was quite clear on this point: "Its [the tuition policy's] practical effect is to drain upper income white and Asian college-bound students from DMHS, subverting that school's efforts to promote racial balance and luring many of its most academically talented students." Pa 257.

3. Contrary to the petition, DMHS is a "*very* good school," Pa 64, (emphasis in original), and THS is *not* superior. Pet. at 8, 17. There are no "good faith educational concerns" about DMHS, Pet. at 5; *see also* Pet. at 11, and there would be no "benefits" of severance. Pet. at 8. Indeed, "every factfinder," Pa 64, rejected petitioner's "effort to cast DMHS as an inferior school. . . ." Pa 40. As to THS, its "formula for educational success" embraces segregation; it is "not a realistic forum for interaction among the children of different races." Pa 64. Even the ALJ, whose recommendations have been superseded by four subsequent decisions, but whom petitioner cites out of context when it has no other support, agreed. He found DMHS to be a high quality school, Pa 26, and that "Cliffs students who abandon DMHS would be losing a very enriching environment which they would be unable to duplicate at the more racially and socioeconomically homogenous THS." Pa 31.

4. Related to petitioner's false "poor quality" charge is another false theme that runs through the petition: that large numbers of Englewood whites have abandoned DMHS because of poor quality, but would return and solve the racial balance problem if DMHS would only become a quality school. *See, e.g.*, Pet. at ii, Question 5, and pages 4, 5, 7, 10, 11, 18, 23-24. This argument was advanced by petitioner, *and rejected,* at every level below. *See, e.g.*, Pa 68 n.7; Pa 138 (". . . there is nothing in the record to indicate that the proportion of the high school age population of

Englewood attending private or parochial school increased during the period relevant to this litigation.") Petitioner presented no competent evidence to support its claim, and the Englewood Board disproved the claim with expert demographic evidence. The Englewood Board proved, and the decisionmakers below found, that the causes of racial imbalance are Tenafly's private tuition policy and petitioner's facilitation of white flight, as well as demographic changes, *e.g.*, Pa 205 n.4; pages 170 and 185-190 of respondent's Appellate Division Appendix below further support this point with expert demographic evidence. *See also*, numbered point 2, above.

5. Contrary to the petition at page 9, New Jersey students have no right or "opportunity . . . to attend any public high school on a tuition basis. . . ." *See also* Pet. at 11, to the same erroneous effect. New Jersey has no statewide "statutorily authorized choice" program. *Cf.* Pet. at 8. The State Board correctly found that N.J. Stat. Ann. § 18A:38-3, the statute upon which petitioner relies, "does not confer on parents the right to select from among the public school districts other than their district of residence. . . ." Pa 133. The statute merely allows districts to accept non-resident students, as long as they do not violate the constitution or other law (as did Tenafly here); it does not require acceptance of nonresidents. Indeed, Tenafly applied "selective entry requirements," Pa 32, and rejected non-resident students who failed to meet them. *See, e.g.*, Pa 251 (Tenafly was primarily "interested in healthy applicants with good grades and good attendance records.")

CONCLUSION

For the foregoing reasons, certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent
Board of Education of the
City of Englewood

Dated: November 5, 1993

APPENDIX A — NOTICE OF MOTION FOR LEAVE TO APPEAL, FILED BY PETITIONER IN THE NEW JERSEY SUPREME COURT ON OR ABOUT JULY 15, 1992

HELLRING LINDEMAN GOLDSTEIN & SIEGAL
Attorneys for Board of Education of the
Borough of Englewood Cliffs
1180 Raymond Boulevard
Newark, New Jersey 07102-4178
(201) 621-9020

SUPREME COURT OF NEW JERSEY

DOCKET NO. 35,501

Civil Action

On Appeal from the June 15, 1992 Opinion of the Superior Court of New Jersey, Appellate Division, Docket Nos. A-6384-90T5F; A-6385-90T5F; A-4912-89T5 (Consolidated)

BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, BERGEN COUNTY,

Petitioner-Cross-Respondent/Appellant,

v.

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,

Respondent-Cross-Petitioner/Cross-Appellant,

v.

BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, BERGEN COUNTY,

Cross-Respondent/Appellant.

Appendix A

NOTICE OF MOTION FOR LEAVE TO APPEAL

TO: Clerk, Supreme Court
Hughes Justice Complex
CN-970
Trenton, New Jersey 08625

Clerk, Appellate Division
Hughes Justice Complex
CN-009
Trenton, New Jersey 08625

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Trenton, New Jersey 08625
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Appendix A

Stephen M. Eisdorfer
Assistant Deputy Public Advocate
Hughes Justice Complex
CN 850
Trenton, New Jersey 08625
Attorney for Wilfredo Carabello, Public Advocate, Amicus Curiae

Bernard K. Freamon, Esq.
1111 Raymond Boulevard
Newark, New Jersey 07102
Attorney for N.A.A.C.P., et al., Amici Curiae

On Appeal From;

That portion of the June 15, 1992 Opinion of the Appellate Division that affirmed the Resolution of the State Board of Education of the State of New Jersey of July 3, 1991 (Appellate Division, Docket Numbers A-6384-90T5F and A-6385-90T5F).

NOTICE is hereby given that the undersigned, counsel for the Board of Education of the Borough of Englewood Cliffs hereby moves for leave to appeal, pursuant to *R.* 2:2-4, from that portion of the June 15, 1992 Opinion of the Appellate Division that affirmed the Resolution of the State Board of Education of the State of New Jersey on July 3, 1991, regarding the conducting of a study of regionalization.

In support of this Motion movant shall rely upon the Appellate Division's Decision, the accompanying Petition For Certification, Statement Of Points To Be Raised On Appeal And Brief In Support Of Motion For Leave To Appeal On Behalf Of The Board Of Education Of The Borough Of Englewood Cliffs, Bergen County, and the briefs and Appendices submitted below.

Appendix A

HELLRING LINDEMAN GOLDSTEIN & SIEGAL
Attorneys for the Board of Education of the Borough of Englewood Cliffs

By: JOEL D. SIEGAL
A Member of the Firm

Dated: July 15, 1992

APPENDIX B — NOTICE OF MOTION FOR LEAVE TO APPEAL AND FOR A STAY, FILED BY RESPONDENT TENAFLY BOARD OF EDUCATION ON OR ABOUT JULY 15, 1992

RIKER, DANZIG, SCHERER, HYLAND & PERRETTI
Headquarters Plaza
One Speedwell Avenue
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(201) 538-0800

Attorneys for Cross-Respondent/Respondent
Board of Education of the Borough of Tenafly, Bergen County

ON APPEAL TO THE SUPREME COURT

Civil Action

BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, BERGEN COUNTY,

Petitioner/Cross-Respondent/Appellant,

v.

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,

Respondent/Cross-Petitioner/Cross-Appellant,

v.

BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, BERGEN COUNTY,

Cross-Respondent/Respondent.

Appendix B

NOTICE OF MOTION FOR LEAVE
TO APPEAL AND FOR A STAY

NOTICE IS HEREBY GIVEN that the Board of Education of the Borough of Tenafly, Bergen County, Cross-Respondent/ Respondent in the above-captioned appeal, moves before the Supreme Court of New Jersey for leave to appeal the decision entered in this cause on June 15, 1992 by the Appellate Division as to the regionalization study and to obtain a stay of same.

RIKER, DANZIG, SCHERER, HYLAND
& PERRETTI
Attorneys for Cross-Respondent/
Respondent
Board of Education of the Borough
of Tenafly, Bergen County
s/ James S. Rothschild, Jr.
James S. Rothschild, Jr.

DATED:

APPENDIX C — ORDERS OF THE NEW JERSEY SUPREME COURT GRANTING THE MOTIONS FOR LEAVE TO APPEAL, FILED ON NOVEMBER 5, 1992

SUPREME COURT OF NEW JERSEY
M-392 September Term 1992
35,501

BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, BERGEN COUNTY,

Petitioner-Respondent,

v.

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,

Respondent-Respondent,

v.

BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, BERGEN COUNTY,

Respondent-Movant.

ORDER

This matter having been duly presented to the Court, it is ORDERED that the motion for leave to appeal is granted.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, on this 2nd day of November, 1992.

s/Stephen W. Townsend
CLERK OF THE SUPREME COURT

Appendix C

SUPREME COURT OF NEW JERSEY
M-393 September Term 1992
35,501

BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, BERGEN COUNTY,

Petitioner-Movant,

v.

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,

Respondent-Respondent,

v.

BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, BERGEN COUNTY,

Respondent-Respondent.

ORDER

This matter having been duly presented to the Court, it is ORDERED that the motion for leave to appeal is granted.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, on this 2nd day of November, 1992.

s/Stephen W. Townsend
CLERK OF THE SUPREME COURT

APPENDIX D — JULY 3, 1991 RESOLUTION OF THE NEW JERSEY STATE BOARD OF EDUCATION ORDERING A REGIONALIZATION STUDY

Board of Education of the Borough of Englewood Cliffs, Bergen County v. Board of Education of the City of Englewood, Bergen County v. Board of Education of the Borough of Tenafly, Bergen County and A.S. by her guardian *ad litem*, R.S. SB #37-88

STATE OF NEW JERSEY

State Board of Education

RESOLUTION

WHEREAS, in its decision of April 4, 1990, the State Board of Education recognized its responsibility to exercise its authority in the case presented to it by the parties so as to insure effectuation of the State's constitutionally derived policy with respect to segregation and racial imbalance in New Jersey's public schools; and

WHEREAS, in that decision, the State Board of Education found that the balance between the racial and national origin groupings at Dwight Morrow High School had deteriorated to such point that the State Board of Education would be denying its responsibility for proper implementation of the State's educational policies were it to fail to take such steps as necessary to correct the situation; and

WHEREAS, in that decision, the State Board of Education directed that certain measures be taken to correct the situation; and

Appendix D

WHEREAS, in that decision, the State Board of Education directed that the Commissioner of Education monitor the composition of the pupil population of Dwight Morrow High School so as to assess the effectiveness of the measures that had been directed by the State Board of Education; and

WHEREAS, that directive was embodied in the Administrative Order accompanying the State Boards decision which was executed on April 5, 1990, wherein the State Board of Education directed the Commissioner of Education to recommend in his first annual report made pursuant to the Administrative Order any additional measures to be taken at the time of his report; and

WHEREAS, in his first annual report to the State Board of Education made on June 5, 1991, the Commissioner of Education recommended that a regionalization study now be conducted to explore the potential for establishing a regional school district including Englewood Cliffs, Englewood and Tenafly; and

WHEREAS, the State Board of Education has considered all arguments submitted in response to the Commissioner's recommendation by the attorneys representing the district boards of education of the Borough of Englewood Cliffs, the City of Englewood and the Borough of Tenafly, and has considered public comment on this item; and

WHEREAS, the State Board of Education has considered the Commissioner's recommendation for a regionalization study; and

WHEREAS, no stay of the State Board's decision of April 4, 1990, has been sought or granted; and

Appendix D

WHEREAS, the State Board of Education believes that it is advisable to consider all potential configurations in exploring the potential for a regional school district so as to insure that the situation that was presented to the State Board will be corrected in the most reasonable, feasible and workable manner possible; now, therefore, be it

RESOLVED, that the State Board of Education accepts the Commissioner's recommendation that a regionalization study now be conducted to explore the potential for establishing a regional school district; and be it

FURTHER RESOLVED, that the study include all potential configurations K-12 which would achieve the State's policy by correcting, among other things, the imbalance of racial and national origin groupings at Dwight Morrow High School; and be it

FURTHER RESOLVED, that the State Board of Education direct the Commissioner to take all steps necessary to begin and complete this regionalization study as expeditiously as possible.

July 3, 1991

s/James A. Jones
President, State Board of Education

s/John Ellis
Secretary, State Board of Education

RN/ch:5/0550D

APPENDIX E — PETITIONER'S JUNE 2, 1993 SUBMISSION TO THE STATE BOARD OF EDUCATION REGARDING THE REGIONALIZATION STUDY

HELLRING LINDEMAN GOLDSTEIN & SIEGAL
Counsellors at Law

June 2, 1993

BY FAX

Mary C. Jacobson, Assistant Attorney General
Department of Law and Public Safety
Division of Law
Richard J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625

Re: Board of Education of the Borough of Englewood Cliffs v. Board of Education of the City of Englewood v. Board of Education of the Borough of Tenafly

Dear Ms. Jacobson:

We will attend the meeting scheduled for 2 p.m. tomorrow at the Department of Education on behalf of Englewood Cliffs. This letter is sent in advance of the meeting to expresss our disagreement with a letter addressed to you from Englewood's counsel which we have just received by fax.

Englewood Cliffs believes that techniques such as freedom of choice and magnet programs directed at improving attendance from all districts would be essential to successfully achieving and maintaining better integrated schools. Consideration of such

possibilities accords with the order of the Appellate Division as well as the observations of the Justices at the argument before the Supreme Court. The consultants to whom Englewood objects may well have creative suggestions and valuable experience in these regards. If so, the Department should hear what they have to offer.

We would also respectfully submit that Englewood's letter violates the premise of the meeting — that counsel meet and conduct themselves on a non-adversarial basis. In light of that, the Department should give no substantive consideration to Englewood's argumentative letter.

Very truly yours,

s/Joel D. Siegal

JDS: bam

cc: (by fax)
Arnold Mytelka, Esq.
James S. Rothschild, Esq.
Honorable Zulima V. Farber
Bernard K. Freamon, Esq.

APPENDIX F — PART VI OF THE OPINION OF THE APPELLATE DIVISION OF THE NEW JERSEY SUPERIOR COURT, EXCERPTED FROM PETITIONER'S APPENDIX (pp. 68a-77a)

[68a]

* * *

VI

We turn next to Cliffs' contention that the State Boards' denial of severance violated its rights under Section 1 of the Fourteenth Amendment to the United States Constitution, which provides that:

> [69a] No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. [U.S. *Const.* amend XIV, § 1].

The Fourteenth Amendment proscribes discrimination on the basis of race and extends to all state action which distinguishes between its citizens solely in racial terms. *See e.g., City of Richmond v. J.A. Croson Co.*, 488 *U.S.* 469, 492-95, 109 *S.Ct.* 706, 720-21, 102 *L. Ed.* 2d 854, 880-82 (1989); *Davis v. City and County of San Francisco,* 890 F.2d 1438, 1445 (9th Cir. 1989), *cert. denied,* __U.S.__, 111 *S. Ct.* 248, 112 *L. Ed.* 2d 206 (1990). The parties here sharply disagree both as to the characterization of the State Board action and the level of judicial scrutiny to be applied under the Fourteenth Amendment. This is important because the nature

of a legislative classification directs the standard of review. *State v. Bulu*, 234 *N. J. Super.* 331, 343, 560 A.2d 1250 (App. Div. 1989).

Regulation of a fundamental right or disparate treatment of a suspect class is subject to strict scrutiny, meaning that it must further a compelling state interest and there must be no less-restrictive means to accomplish that goal. *City of Cleburne v. Cleburne Living Center*, 473 *U.S.* 432, 440, 105 *S. Ct.* 3249, 3254, 87 *L. Ed.* 2d 313, 320 (1985); *Massachusetts Bd. of Retirement v. Murgia*, 427 *U.S.* 307, 311-13, 96 *S. Ct.* 2562, 2566-67, 49 *L. Ed.* 2d 520, 524-25 (1976); *San Antonio Independent School District v. Rodriguez*, 411 *U.S.* 1, 16-17, 93 *S. Ct.* 1278,1287, 36 *L.Ed.* 2d 16, 33 (1973); *Brown v. City of Newark*, 113 *N.J.* 565, 573, 552 *A.*2d 125 (1989); *Barone v. Dep't of Human Services*, 107 *N. J.* 355, 365, [70a] 365, 526 *A.*2d 1055 (1987) (citing *Graham v. Richardson*, 403 *U.S.* 365, 91 *S. Ct.* 1848, 29 *L. Ed.* 2d 534 (1971)); *State v. Bulu, supra*, 234 *N.J.* Super. at 343-44, 560 *A.*2d 1250. Regulation which involves a semi-suspect class or which indirectly affects a fundamental right, is subject to an intermediate level of scrutiny, must further an important governmental interest and be substantially related to the achievement of that objective. *City of Cleburne v. Cleburne Living Center, supra*, 473 *U.S.* at 441, 105 *S. Ct.* at 3255, 87 *L. Ed.* 2d at 321; *Craig v. Boren*, 429 *U.S.* 190, 197, 97 *S. Ct.* 451, 457, 50 *L. Ed.* 2d 397, 407(1976);*Greenberg v. Kimmelman*, 99 *N.J.* 552, 565, 494 *A.*2d 294 (1985); *State v.Bulu, supra*, 234 *N.J.* Super. at 344, 560 *A.*2d 1250. In all other cases, the rational basis test applies, requiring only that there be some rational connection between the state action and the legitimate state interest sought to be achieved. *See Massachusetts Bd. of Retirement v. Murgia, supra*, 427 U.S. at 312, 96 *S. Ct.* at 2566, 490 *L. Ed.* 2d at 524; *Drew Associates of New Jersey, LP v. Travisano*, 122 *N.J.* 249, 258-59, 584 *A.*2d 807 (1991); *Barone v. Dep't of Human Services, supra*, 107 *N. J.* at 364-65, 526 *A.*2d 1055 (citing

Dandridge v. Williams, 397 *U.S.* 471, 90 *S. Ct.* 1153, 25 *L. Ed.* 2d 491 (1970)).

Cliffs naturally argues that strict scrutiny is required because it views the State Board's decision as "based upon the race of the Cliffs' student population and nothing else." According to Cliffs, what the State Board has done here is to "seize" children from across district lines on the basis of their race to avoid racial imbalance at DMHS. Such a characterization may apply to some case, but not the one before us. The sending-receiving side of this case is not a test of the right of the Commissioner and the State Board to force the exchange of students between districts which previously had no such policy among themselves. What is at issue here is a long-standing legal relationship between Cliffs and [71a] Englewood pursuant to which the children of Cliffs have crossed school district borders voluntarily over the last quarter century. It is Cliffs which seeks to alter that status quo. In order to do so, it must meet the requirements of *N.J.S.A.* 18A:38-13, which apply to all school districts seeking to sever a sending-receiving relationship. The statutory standards are not *per se* under attack here. Thus it is hard to follow Cliffs' argument as to "seizure" of children across district lines or the creation of any classification, let alone a suspect racial one.

What is at issue here is an administrative adjudication based upon legislatively mandated considerations including the intertwined concepts of the quality of education and the racial composition of the schools in question. Is it race conscious as Cliffs contends? The answer is yes. Is race consciousness prohibited? The answer is no. It is only the *per se* use of race as a determinant which creates a classification subject to strict scrutiny under the Fourteenth Amendment. *Porcelli v Titus*, 431 *F.*2d 1254, 1257 (3d Cir. *1970), cert. denied*, 402 *U.S.* 944, 91 *S. Ct.* 1612, 29

*L.Ed.*2d 112 (1971). The United States Constitution does not prohibit states from taking race into account in educational decisions. *Wygant v. Jackson Bd. of Educ.*, 476 *U.S.* 267, 106 *S. Ct.* 1842, 90 *L. Ed.* 2d 260 (1986). Our Supreme Court so concluded in *Morean v. Bd. of Educ. of Montclair, supra,* which is controlling here, and which found "no substance to the petitioners' contention that since its plan of relocation had some racial motivation it was violative of the fourteenth amendment." 42 *N.J.* at 243, 200 *A.2d* 97. *See also Schults v. Bd. of Educ. of Teaneck,* 86 *N.J.* Super. 29, 40-41, 205 *A.*2d 762 (App. Div. 1964), *aff'd,* 45 *N.J.* 2, 210 *A.*2d 762 (1965).

Cliffs' reliance on *City of Richmond v. J.A. Croson Co., supra, Wygant, supra,* and *Regents of the University of California v.* [72a] *Bakke,* 438 *U.S.* 265, 98 *S. Ct.* 2733, 57 *L. Ed.* 2d 750 (1978), a series of recent United States Supreme Court decisions which invalidated true racial classifications, is misplaced. In *Bakke, supra,* a white medical school applicant was denied the opportunity to compete for 16 seats of the entering class *solely* because of his race. 438 *U.S.* at 272-79, 98 *S. Ct.* at 2734-42, 57 *L. Ed.* 2d at 759-64. In *City of Richmond v. J.A. Croson Co., supra,* whites were denied the opportunity to compete for a fixed percentage of public contracts *solely* because of their race. 488 *U.S.* 478-82, 109 *S. Ct.* at 713-15, 102 *L. Ed.* 2d at 871-75. In *Wygant v. Jackson Bd. of Educ., supra,* there was a preferential layoff system in which minority teachers were retained over non-minority tenured teachers *solely* because of their race. 476 *U.S.* at 269-72, 106 *S. Ct.* at 1845, 90 *L. Ed.* 2d at 266-67. In an effort to analogize this case to the cited precedent, Cliffs argues that the "State Board attempted to reserve places for whites at DMHS in order to reduce minority representation." This is a distortion of what actually occurred. No amount of ingenuity can bring this case within the interdiction of *Bakke, Wygant* and *Croson* which

involved absolute racial preferences in a zero-sum context. Indeed, a majority of Justices in *Bakke* specifically concluded that to achieve diversity, race is an appropriate consideration in school admission decisions. 438 *U.S.* at 318-20, 98 *S.Ct.* at 2762-63, 57 *L. Ed.* 2d at 788-90 (Powell, J.); *Id.* at 324-25, 98 *S.Ct.* at 2765-66, 57 *L. Ed.2d* at 792-93 (Brennan, White, Marshall and Blackmun, JJ., concurring). In *Lige v.Town of Montclair,* 72 *N.J. 5,* 367 *A.*2d 833 (1976), our Supreme Court unambiguously explained the difference between a quota issue and the matter under review:

> It is important to recognize the difference between rectifying a racially improperly constituted school, *Jenkins v. Tp. of Morris School District and Bd. of Ed.,* 58 *N.J.* 483 [279 [73a] *A.*2d 619] (1971), for no one has a right to attend a segregated school; whereas an applicant for a job or a promotion has a right to be considered and judged irrespective of race. [72 *N.J.* at 24, 367 *A.*2d 833].

If a classification exists here at all, which we doubt, it is not racial but geographic — all Cliffs' students are involved equally. The designated public high school for Cliffs' residents remains DMHS, and the injunction precludes other public school boards from accepting any Cliffs' student, regardless of race. Conversely, the injunction does not preclude other public school boards from accepting, for tuition, students who reside outside of Cliffs and Englewood. As such, the standard to be applied is a rational basis standard which requires only that there be some reasonable connection between a legitimate state interest and the action taken. *See Drew Associates, supra,* 122 *N.J.* at 258-59, 584 *A.*2d 807; *Barone v. Dep 't of Human Services, supra,* 107 *N. J.* at 364-65, 526 *A.*2d 1055.

Appendix F

Even if we were to concede that the State Board's decision constitutes a race-based classification with respect to white Cliffs' students, that remedy would still pass constitutional muster. The State's compelling interest in diversity in the public schools *as a function of education* cannot be seriously questioned. *Jenkins, supra,* 58 *N.J.* at 498-99, 279 *A.*2d 619 (citing *Booker, supra,* 45 *N.J.* at 170-71, 212 *A.*2d 1). Concomitantly, the State's interest in "assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice" is beyond dispute. *City of Richmond v. J.A. Croson Co., supra,* 488 *U.S.* at 492, 109 *S.Ct.* at 720, 102 *L. Ed. 2d* at 881 (comparing *Norwood v. Harrison,* 413 *U.S.* 455, 465, 93 *S. Ct.* 2804, 2810, 37 *L. Ed.* 2d 723, 731(1973)). The only question then is whether the [74a] decision is as narrowly tailored as it could be; was it the least restrictive means to accomplish the goal?

Cliffs contends that the State Board's action was overbroad because it ordered an inter-district remedy even though no inter-district violation had been found, contrary to *Milliken v. Bradley,* 418 *U.S.* 717, 94 *S. Ct.* 3112, 41 *L. Ed.* 2d 1069 (1974). This argument misapprehends *Milliken.* There the Supreme Court struck down a remedy imposed by the District court to relieve *de jure* school discrimination in Detroit. The District Court had ordered a consolidation of Detroit and 53 suburban school districts because it had determined that a Detroit-only remedy would not alleviate the effects of the segregation. *Id.* at 729-34, 94 *S. Ct.* at 3119-22, 41 *L. Ed.* 2d at 1082-85. There was no evidence of any discrimination in the suburban districts. While Cliffs is correct when it contends that *Milliken* limits inter-district relief to inter-district violations, it errs in its attempt to apply that holding to this case. *Milliken* did nothing more than define the limits of a federal court's equity jurisdiction; the decision did not circumscribe in any way a state's authority to effectuate its own educational policies.

Indeed, as the Supreme Court stated in *Hills v. Gautreaux*, 425 *U.S.* 284, 296, 96 *S. Ct.* 1538,1545, 47 *L. Ed.* 2d 792, 802-03 (1976):

> The District Court's desegregation order in *Milliken* was held to be an impermissible remedy not because it envisioned relief against a wrongdoer extending beyond the city in which the violation occurred but because it contemplated a *judicial decree* restructuring the operation of local governmental entities that were not implicated in any constitutional violation. [Emphasis added].

[75a] The same reasoning is applicable to Cliffs' reliance on the recent United States Supreme Court decision in *Freeman v. Pitts*, 503 *U.S.* __, 112 *S. Ct.* 1430, 118 *L. Ed.* 2d 108 (1992). Like *Milliken, Freeman is* a study of the limits of a federal court's continuing supervisory authority over a court-ordered plan to combat *de jure* segregation. *Freeman* addressed the margins of federal court authority where *de jure* segregation has undergone a period of transition to *de facto* segregation. *Freeman v. Pitts*, 503 *U.S.* at __, 112 *S.Ct.* at 1447,118 *L. Ed.* 2d at 136 (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 *U.S.* 1, 31-32, 91 *S. Ct.* 1267,1283-84, 28 *L. Ed.* 2d 554, 575 (1971)). In the federal jurisdiction context, this is an important issue because federal courts are powerless to remedy *de facto* segregation. *See Freeman v. Pitts*, 503 *U.S.* at __, 112 *S. Ct.* at 1443-48, 118 *L. Ed.* 2d at 136-39; *Bd. of Educ. of Oklahoma City Public Schools v. Dowell*, 498 *U.S.*__, __, 111 *S. Ct.* 630, 637-38, 112 *L. Ed.* 2d 715, 728-30 (1991); *Pasadena City Bd. of Educ. v. Spangler*, 427 *U.S.* 424, 436, 96 *S. Ct.* 2697, 2704, 49 *L. Ed.* 2d 599, 608 (1976). Nothing in *Milliken* or *Freeman* suggests that the limits there expressed are applicable to judgments of the highest state educational authority

as to how to carry out longstanding state policies in favor of racial balance as a function of a thorough and efficient educational system. Whatever the Federal Constitution compels, it does not preclude such action by the State. *Jenkins, supra,* 58 *N. J.* at 498-99, 279 *A.*2d 619. Further, it is clear that the State Board here has applied the least intrusive remedy. It has not yet required consolidation of two unrelated districts; it has only enforced a long-standing voluntary, preexisting inter-district relationship.

Moreover, and notwithstanding that a particularized finding of intentional discrimination is not a prerequisite for state remedies for racial imbalance, *Jenkins, supra,* 58 *N.J.* at 506, 279 *A.*2d 619; *Booker, supra,* 45 *N.J.* at 170-78, 212 *A.*2d 1, such findings are the [76] leitmotif which runs throughout the decisions here. The Commissioner and the State Board clearly found that Cliffs' residents had engaged in white flight from DMHS, which flight was facilitated by the Tenafly Board's private tuition policy and by the Cliffs Board. As the Commissioner noted: "[n]o one could seriously believe that racial prejudice and circumvention of integration is not at play in this case." Likewise, the State Board concluded that to deny relief here would be to make the State a "passive participant" in private *discrimination.* No more specific findings are required. Under the circumstances, the State Board's action clearly passes strict scrutiny; it goes without saying that the lesser burdens are also met.

We turn next to Cliffs' New Jersey constitutional claim. Article I, paragraph 1 of the State Constitution protects against the unequal treatment of those who should be treated alike. *Barone v. Dep't of Human Services, supra,* 107 *N.J.* at 367, 526 *A.*2d 1055 (quoting *Greenberg v. Kimmelman, supra,* 99 *N.J.* at 568, 494 *A.*2d 294). When analyzing equal protection claims under the New Jersey Constitution, a balancing test similar to a Fourteenth

Amendment analysis is applied. *Barone*, 107 *N.J.* at 368, 526 *A.*2d 1055. The weights in the balance are the nature of the affected right, the extent to which the government's restriction intrudes upon it and the public's need for the restriction. *Greenberg v. Kimmelman, supra*, 99 *N.J.* at 567, 494 *A.*2d 294; *State v. Bulu, supra*, 234 *N.J. Super.* at 344, 560 *A.*2d 1250. In describing the application of the analysis under the State Constitution, our Supreme Court has said that the focus is on "whether there is an appropriate governmental interest suitably furthered by the differential treatment" embodied in the action complained of. *Barone, supra*, 107 *N.J.* at 368, 526 *A.*2d 1055 (quoting *Borough of Collingswood v. Ringgold*, 66 *N.J.* 350, 370, 331 *A.*2d 262 (1975), *appeal dismissed*, 426 *U.S.* 901, 96 *S.Ct.* 2220, 48 *L. Ed.* 2d 826 [77] (1976)). For the same reasons that we have rejected Cliffs' Fourteenth Amendment claim, we view its New Jersey constitutional analogue as insubstantial. As we have said, our State's education policy is advanced by the State Board's decision here which is a measured response to the problem presented.

It should not go unsaid that we agree with Englewood and the *amici* that Cliffs' invocation of the Fourteenth Amendment here turns that constitutional provision "on its head." The Fourteenth Amendment and its New Jersey counterpart are meant to shield our citizens against state sanctioned racial discrimination. To suggest that they prohibit a state from applying a statute, specifically addressed to remedying the educationally pernicious evils of white flight, racial imbalance, and *de facto* segregation in the schools is, at best, cynical.

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